No. 78-1789

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS CO., PETITIONER

v.

FRANK J. HALL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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In our initial response to the instant petition, filed pursuant to the Court's invitation of October 1, 1979, we informed the Court that the Commission had under consideration an application by the respondents for a waiver of the Commission's rate filing requirements. As the attached order shows (App., *infra*, 1a-15a), the Commission has voted to deny the application for a waiver. For the reasons stated in our initial brief, we believe that the filed rate doctrine (*Montana-Dakota Utilities Co.* v. *Public Service Co.*,

341 U.S. 246 (1951)) bars respondents from recovery of damages for the period from 1961 to 1972. Accordingly, we recommend that the Court grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of Louisiana.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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General Counsel
Federal Energy Regulatory Commission

NOVEMBER 1980

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY
REGULATORY COMMISSION

FILED RATE DOCTRINE
CONTRACT DAMAGES

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., George R. Hall and J. David Hughes.

Docket No. RI76-28

ARKANSAS LOUISIANA GAS COMPANY

v.

FRANK J. HALL, *et al.*

ORDER DENYING APPLICATION FOR WAIVER OF FILING REQUIREMENTS

(Issued November 5, 1980)[1]

On May 24, 1979, Frank J. Hall, *et al.* (the Hall group) filed an application pursuant to Section 154.98 of the Commission's[2] Regulations requesting a waiver of the notice requirements contained in

[1] This order has been modified to reflect an *errata* notice issued November 6, 1980, correcting an order posted on November 5, 1980.

[2] The term "Commission," when used in the context of action taken prior to October 1, 1977, refers to the Federal Power Commission (FPC); when used otherwise, the reference is to the Federal Energy Regulatory Commision.

Section 4(d) of the Natural Gas Act.[3, 4] In support of its request, the Hall group asserts that timely compliance with Section 4(d) was impossible because Arkansas Louisiana Gas Company (Arkla) wrongfully concealed from the Hall group the facts which would have made such compliance possible. The effect of granting the waiver would be to allow the Hall group to collect from Arkla for the period September 1961-October 1972, a rate for gas in the Sligo field higher than that on file with the Commission. For the reasons given below, we reaffirm our conclusion that the filed rate doctrine applies and deny the waiver.

PROCEDURAL HISTORY

A. *State Court Proceedings*

On July 18, 1974, the Hall group brought a breach of contract suit against Arkla in a Louisiana court.[5] The suit concerned the proper interpretation of a favored nations clause contained in a 1952 gas purchase contract between the Hall group and Arkla. It was the Hall group's contention that royalty payments made to the United States Government by Arkla since 1961 had triggered the clause.

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[3] In addition, the Hall group filed an additional petition seeking waiver on May 29, 1980. This petition requests no additional relief.

[4] The Hall group's request for waiver is presented in the alternative. The first request, and one that would moot the waiver question, is for a finding by the Commission that the award of damages in a contract action by the Louisiana courts does not involve this Commission's jurisdiction.

[5] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo Parish, Louisiana, No. 225,699.

The Louisiana State District Court rendered a verdict in favor of the Hall group. The court found that the favored nations clause had been triggered by the U.S. royalty payments and awarded damages to the Hall group for the period from October, 1972, through December, 1975. The court concluded that it could not award the Hall group damages for the period prior to October, 1972, because such an award would constitute a rate change, and the courts do not have authority to authorize rate changes. Damages for the 1972-1975 period were appropriate, according to the court, because the Hall group was a small producer during that time, and under the Commission's Regulations, small producers were not required to make rate change filings.[6]

On review, the Louisiana Second Circuit Court of Appeal affirmed.[7] The Louisiana Supreme Court subsequently modified the decision of the lower courts, holding that the Hall group was entitled to recover for the 1961-1972 period.[8]

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[6] These findings are consistent with the view of the Commission as expressed in orders issued both before and after the Louisiana District Court's opinion.

[7] The Court of Appeal also recited the fact that the trial court had not found fraud and stated that the record would not support a finding of fraud. *Hall* v. *Arkansas-Louisiana Gas Company*, 359 So.2d 255 (La.Ct.Ap. 1978).

[8] *Hall* v. *Arkansas-Louisiana Gas Company*, 368 So.2d 984 (La. 1979) *cert. denied*, Oct. 1, 1979, —— U.S. ——. Arkla's Petition on rehearing of the denial of certiorari to the decisions of the Louisiana Court of Appeal is now pending in the United States Supreme Court. *Arkansas Louisiana Gas Company* v. *Hall*, Sup. Ct. No. 78-986, filed December 18, 1978. In *Arkansas-Louisiana Gas Company* v. *Hall*, Sup. Ct. No. 78-1789, filed May 29, 1979, Arkla sought certiorari of the Louisiana Supreme Court's order assessing liability for the

B. *Commission Proceedings*

On September 11, 1975, Arkla filed in this docket a petition for a declaratory order construing the favored nations clause. The Commission declined to resolve the contractual dispute, stating in its March 8, 1976, order that "[i]t has been Commission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in court . . . ." [9] Arkla appealed this decision to the D.C. Court of Appeals,[10] and while the appeal was pending, the Commission moved for an order remanding the record for further consideration. The Commission's request was granted by the court on May 25, 1978.

On remand, the Commission, in an order issued May 18, 1979, adhered to its earlier determination to decline to exercise jurisdiction. It did so, however, for a reason different than that enunciated in the March 8, 1976, order. The Commission stated that it "believe[d] the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous." [11] Rather, the Commission stated, the decision to defer should turn on whether the Commission finds that the issue involves a matter of "primary jurisdiction." In making this determination, the Commission stated, it would look to the following three factors:

1961-1972 period. In Sup. Ct. No. 79-1896, Arkla has sought certiorari of the judgment entered by the Louisiana district court on the remand of the damages issue.

[9] *Mimeo*, at 3.

[10] *Arkansas Louisiana Gas Company* v. *FERC*, D.C. Cir. No. 77-1146.

[11] Order issued May 18, 1979, mimeo, at 6.

(1) whether the Commission possesses some special expertise which makes the case particularly appropriate for Commision decision;

(2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and

(3) whether the case is important in relation to the regulatory responsibilities of the Commission.[12]

After reviewing these three factors in the context of the instant case, the Commission concluded that the assertion of jurisdiction was unnecessary. In its discussion, however, the Commission expressed the view that the Louisiana Supreme Court's award of damages for the 1961-1972 period violated the filed rate doctrine.[13]

Thereafter, the Hall group filed its application for a waiver of the notice requirements prescribed in Section 4(d). Arkla submitted a response and protest to the application on June 8, 1979. The Hall group filed a reply to Arkla's response on June 13, 1979.

POSITIONS OF PARTIES

The Hall group filed its request conditionally, contending that a waiver of the filing requirements is not necessary since Section 4(d) has no applicability to a judicial award of damages for breach of contract. The Hall group then contends that if a waiver is required, principles of law and equity establish that a waiver is justified. The Hall group argues that the only reason that it failed to comply with the notice provisions of Section 4(d) was because Arkla

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[12] *Id.*

[13] *Id.* at 10, n. 18.

wrongfully concealed from the Hall group the royalty payments which Arkla was making to the United States.

Arkla asserts that the requirements of Sectior 4(d) apply to the court-awarded damages because such damages are merely the additional prices to be paid under the 1952 contract, as interpreted by the courts of Louisiana. Arkla further asserts that the filed rate doctrine absolutely precludes the Hall group from collecting any damages for the period prior to October, 1972. Arkla also denies any allegations of wrongdoing on its part, and argues that the Hall group is simply seeking a windfall at the expense of the consumer.

DISCUSSION

The Commission has before it two issues: (1) does Section 4(d) of the Natural Gas Act apply to the matter of damages awarded to the Hall group for the 1961-1972 period? and (2) if so, is there good cause to grant waiver of Section 4(d) in this case and, further, accept the rates filed by the Hall group. Both of these questions involve the scope of and reasons for the filed rate doctrine.

A. *Applicability of Section 4(d)*

We address first the contention of the Hall group that Section 4(d) is inapplicable here. Citing *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 P.2d 1236 (Okla. 1972), *appeal dismissed* and *cert. denied*, 409 U.S. 1052 (1972) and *Cities Service Gas Company* v. *FPC*, 535 F.2d 1278 (D.C. Cir. 1976), the Hall group argues that a court award of damages for breach of contract is an entirely "separate and independent" issue from the question of rate obliga-

tions imposed by Sections 4 and 5 of the Natural Gas Act.

Section 4(d) of the Natural Gas Act provides that a natural gas company shall not change its rates without 30 days' notice to the Commission, unless the Commission shall, for good cause shown, waive this requirement. There is no question that had Arkla given the Hall group the notice of the government royalty payments that the Louisiana courts held Arkla was required by contract to give, the Hall group would have been required to comply with Sections 4 and 5 of the Natural Gas Act in seeking to charge the higher rate. The question, then, is whether consideration of the matter in the context of a state court contract action (involving rates for past sales) takes the matter outside the purview of the Natural Gas Act. The Louisiana Supreme Court held that it does. We disagree.

State courts—and Federal courts as well—may have a wide variety of actions between natural gas companies and their customers brought before them. Obviously, not all damage awards are barred by the Federal preemption and the assignment of regulatory responsibility to this Commission, but some are. To pick the two extremes, damages for an automobile accident between an Arkla vehicle and a Hall group vehicle are not barred, but an order in a state court action on a contract purporting to set the rate for prospective sales of natural gas in interstate commerce is barred. We believe that this case is merely the latter example presented in slightly different form, and that the policy considerations underlying the statutory and common law establishment of the filed rate doctrine dictate the conclusion that the Natural Gas Act applies to Louisiana's award of damages to the Hall group for the 1961-1972 period.

The filed rate doctrine has at least two aspects and policy bases, both of which are pertinent here. The first is the need for certainty as to the rates and other terms governing a regulated transaction. The Congress lodged exclusive jurisdiction in this agency to regulate sales of natural gas in interstate commerce, and provided in Section 4(c) of the Natural Gas Act that rates and charges for such sales be kept on file with this Commission. Section 4(d) provides that rates for such sales may not be changed without thirty days' notice to the Commission. These provisions have the effect of giving certainty to both buyers and sellers of natural gas in the interstate market, since only the rate filed with the Commission may be charged.

A second aspect to the filed rate doctrine is that it ensures that the rates charged for natural gas in interstate commerce are, in the words of Section 4(a) of the Natural Gas Act, "just and reasonable". As the courts have repeatedly held, the determination of a just and reasonable rate is a matter requiring expert judgment, and the statute gives the Commission "exclusive powers . . . to determine what those rates are to be." *Montana Dakota* v. *Northwestern Public Services Co.*, 341 U.S. 246, 250 (1951).

In the case before us, the effect of the Louisiana Supreme Court's holding is to permit the collection of a rate different from and higher than the rate the Hall group had on file with the Commission, and to permit the collection of this higher rate without the Commission's having determined that the different and higher rate is just and reasonable.

The Louisiana Supreme Court appears to have recognized in some respects that the award to the Hall group has the effect of increasing the rate for gas sold during the 1961-1972 period above the rate

on file during that period, but the Court applied Article 2040 of the Louisiana Civil Code to "consider fulfilled" the Section 4(c) filing requirement. 368 So. 2d at 990. But state law cannot be a legitimate basis for relieving a natural gas company of an obligation under the Natural Gas Act. What is more, the effect of the Louisiana decision is to undo the certainty of the applicable rate discussed above.

The Louisiana Supreme Court did not directly confront the question of whether it was making a just and reasonable rate determination and thus overstepping its authortiy. Rather, the Court reasoned that it was only attempting to remedy a contract breach, and that it was speculating about the Commission's likely response to a timely filing by the Hall group only for the purpose of calculating the damages that the Hall group probably suffered as a consequence of Arkla's breach. While we do not question the adequacy of this reasoning under Louisiana law, we believe the damage award constitutes a rate increase without the Commission's having determined that the new rate is just and reasonable, to the detriment of the Federal statutory scheme. Simply put, if the mere fact that a state court may have concurrent jurisdiction over a contract is sufficient to take all disputes that might arise under the contract, and all possible remedies that might be found for breach of the contract, outside the scope of the Natural Gas Act, then the certainty as to rates that results from the filing requirements in Section 4(c) and 4(d) of the Natural Gas Act is lost, and the Commission's exclusive jurisdiction to determine just and reasonable rates for interstate gas is rendered meaningless.

The case most closely on point is *Montana-Dakota, supra.* Although the question at issue in *Montana-*

Dakota was somewhat different, since the case arose when plaintiff sought damages grounded in fraud in a federal district court, there is much in *Montana-Dakota* to provide guidance here. In particular, the court stated (341 U.S. at 251) that "[petitioner] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." [14] Thus, the most the Louisiana courts were empowered to do in this circumstance as to the 1961-1972 period was to construe the contract (the Commission having disclaimed primary jurisdiction) and reach the conclusion that under the contract the Hall group was entitled to file a rate increase application with the Commission.

Cities Service is not to the contrary. There the court found that Cities Service had breached its contractual obligation to cooperate with Western in an abandonment proceeding before the Commission. Accordingly, *Cities Service* was ordered to pay damages

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[14] Mr. Justice Jackson, speaking for the majority, stated later in the opinion (341 U.S. at 252) that "if the petitioner's grievance arises from active fraud and deceit, it gains nothing from the Federal Act." As we have noted (fn. 5 *supra*), the Louisiana courts were unable, on the record before them, to find such active fraud or deceit. Thus we do not believe that, in this instance, the Louisiana courts have the authority to authorize a price other than the filed rate for natural gas sold in interstate commerce. However, this Commision, in determining whether good cause exists for waiver of the notice requirements of Section 4(d), may take into account and attribute appropriate weight to the withholding from the Hall group of the information necessary for the Hall group to determine that it was entitled under the contract to file a rate increase application with the Commission.

to compensate Western for the money Western had lost as a result of its inability to market its gas elsewhere. Thus, in *Cities Service*, there was no dispute between the parties regarding the proper interpretation of the price terms of their contract. Unlike the instant case, the damages awarded in *Cities Service* did not constitute additional monies reflecting a putative increase in the price at which gas had been sold in past transactions.[15] Accordingly, the litigation in *Cities Service* had no impact upon the Commission's obligation to ensure that interstate sales

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[15] Put another way, the award of damages in *Cities Service* did not consist of the difference between the Commission-determined just and reasonable rate for Western's sales to Cities service and an alternative price for the same gas sold and bought by the same parties, based upon an assumption that the Commission somehow would have found the alternative price, rather than the filed rate, to be just and reasonable. As the court stated in Cities Service (535 F.2d at 1287):

> [T]he Oklahoma courts and the FPC were confronted with separate and distinct issues—the former involving Cities' responsibility in a breach of contract suit for damages caused to Western's leasehold interests and the latter involving Cities' obligations under the natural gas act to pay the just and reasonable rate for gas served and delivered to it . . . .

By contrast, in the instant case the Louisiana courts have, in effect, determined a rate that, in their view, should have been the just and reasonable rate—a determination that is within this Commission's *exclusive* jurisdiction. *See Montana-Dakota, supra.* The *Cities Service* decision (535 F.2d at 1287) lists a number of other factors, in addition to the price of the gas as sold to Western, that the Oklahoma court took into account in determining damages. In the instant case, there are no factors other than the difference between the filed rate and the rate the Louisiana courts thought appropriate under the contract.

of gas are made in accordance with the rate and filing requirements prescribed in Sections 4 and 5.

B. *Merits of Hall's Request for Waiver of Section 4(d)*

This holding does not, however, end the inquiry. The Hall group has asked in the alternative that we waive the filing requirements of Section 4(d) for good cause so as to give effect to the Louisiana court's finding on the contract as of 1961.

In the circumstances of this case, we are unable to conclude that good cause exists to waive the Section 4(d) filing requirements. The basis for our view that waiver would be inappropriate is the long-established "statutory bias" against retroactive rate increases.[16] What makes the rate increases in this case particularly unacceptable is the uncommonly severe nature of the retroactivity proposed. Hall is here attempting to expose consumers to a potential liability for higher rates beginning in 1961 and continuing for some 11 years thereafter. This we simply cannot sanction.

We are also very concerned about the possible unsettling effect that a waiver in this case might have on other gas purchase transactions. If the Hall group is granted a higher rate for its gas effective in 1961, there is a strong likelihood that claims would arise asserting that this increase triggered the operation of indefinite price escalator provisions[17] in other

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[16] *Gillring* v. *FERC*, 566 F.2d 1323, 1325 (5th Cir., 1978) describing the effect of the filed rate doctrine.

[17] In 1961, the Commission outlawed most indefinite pricing provisions in newly-executed contracts. Such provisions in existing contracts, however, could continue to operate. Order No. 232, 25 FPC 379 (1961); *The Pure Oil Company*, 25 FPC 383 (1961).

contracts in the Sligo Field geographical area, quite possibly involving pipelines other than Arkla.[18] This, of course, would open the door to additional rate increase requests and requests for waiver for the same period. As a matter of policy, we do not believe it is in the public interest to take actions in the name of equity that have the potential for reopening transactions which took place almost 20 years ago. The potential impact of such reopenings on our regulatory responsibilities appears substantial.[19]

Finally, we confess that we are at least troubled by the prospect of speculating as to what the Commission would or would not have done in 1961 had it been confronted at that time with a rate increase filing by the Hall group. The filing would, of course, have been based upon the Hall group's contention that a royalty payment activated its favored nations clause. Since a question of contractual authorization for the rate increase would have arisen, the Commission, we believe, would almost certainly have either suspended or rejected the filing.[20] Whether the Commission in

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[18] Our records indicate that there may be a number of contracts so affected. Some contracts signed by other pipelines contain clauses which are triggered upon the payment of a higher price by any buyer in a geographical area.

[19] We declined to assert our primary jurisdiction in the May 18, 1979 order in large part because we perceived no significant effect upon our regulatory responsibilities resulting from an interpretation of the favored nations clause favorable to the Hall group. Had we not believed that the filed rate doctrine banned a rate increase (through damages) for the 1961-1972 period, we no doubt would have had serious misgivings about declining jurisdiction over the question of contract interpretation.

[20] The Louisiana Supreme Court assumed that the Commission would have accepted the filing, based upon the November 8, 1976, order of the FPC. 368 So.2d at 991. How-

1961 would have provided a forum for resolving the contractual dispute is a question we cannot answer definitively; under the grounds asserted by the FPC in 1976 for disclaiming primary jurisdiction over the contract interpretation question and under the different grounds adopted by the Commission in its May 18, 1979, order, the Commission would have taken jurisdiction over the contract interpretation in 1961. At that time, the Commission might well have concluded that the favored nations clause was not triggered. More importantly, even if the Commission in 1961 had reached the same contractional interpretation as the Louisiana court, the Commission might have determined that the public interest would not permit the grant of rate increases based upon the triggering of favored nations clauses even in existing contracts.[21]

We recognize the determination of the Louisiana courts that the Hall group did not file for a rate increase in 1961 because Arkla withheld from the Hall group information that the Louisiana courts found Arkla was required to give the Hall group, and we realize that as between the Hall group and Arkla, the equities are favorable to the Hall group. But the Louisiana courts did not find active fraud or deceit in this withholding of information, and our own review of the record before us leads us to con-

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ever, neither the FPC in 1976 nor the Commission today purports to declare what the FPC's actions would have been in 1961.

[21] As we have already noted, the Commission acted in 1961 to outlaw indefinite pricing provisions and deny effect to newly-executed contracts. If the Commission had extended this policy to such clauses in existing contracts, it might have done so only where government royalty payments were involved; or it might have done so across-the-board.

clude that Arkla could have reasonably assumed that the government royalty payment did not trigger the indefinite price escalator in the contract with the Hall group. More importantly, as is discussed at some length above, we must place this particular case in the context of our broader regulatory responsibilities. And on balance, after considering the matter in this broader context, we cannot accept the potential for disruption of natural gas markets or the speculation as to how our predecessors would have acted nineteen years ago. Therefore, we deny waiver.

In summary, we find that good cause does not exist to waive notice provisions of Section 4(d). Accordingly, the Hall group's application will be denied.

The Commission orders:

The Hall group's request for a waiver of the filing requirements prescribed in Section 4(d) of the Natural Gas Act is denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

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